It was mentioned to me previously that petitioner had no election agent. But going through the *Gazette* of 6th July 1967 I note that the name of the petitioner's election agent was named in the returns published. The petitioner produced a letter he wrote to the Returning Officer, Kudat, advising him that his election agent had declined to act as such and had not in fact acted for him. An affidavit from the Acting State Supervisor of Elections now shows that a mistake has been made to the insertion of the name of the election agent. I am satisfied that petitioner did not in fact have an election agent.

All the parties to the petition except Mr. Chong Thain Vun have filed their affidavits. In view of the peculiar circumstances of the case and in pursuance of the proviso to rule 21(2) of the Election Petition Rules, 1954, I would dispense with his affidavit.

I have been told of the political undercurrent existing in the State and of the fact that the petitioner was more or less under party pressure to file his petition. All these may be true but I must make it quite clear that I am not in the least interested in those matters. I am concerned only with the law. I have to decide whether on the evidence before me I should grant leave for the withdrawal of the petition. Having regards to the evidence I am satisfied that no unlawful agreement or undertaking has been entered into in relation to the withdrawal. I therefore grant leave to the petitioner to withdraw his petition. I will now hear parties on question of costs.

Leave to withdraw petition granted.

[*Note:* After hearing parties on the question of costs, the respondent was awarded costs to be taxed on the higher scale and the security lodged to be applied in payment of taxed costs and to be paid out to the respondent. *Ed.* M.L.J.].

MIRANDA v. KHOO YEW BOON

[F.C. (Azmi C.J. (Malaya), Ismail Khan and Gill JJ.) December 12, 1967]

[K.L. — Federal Court Civil Appeal No. X. of 1967]

Advocates and Solicitors — Professional negligence — Liability for negligence in a fused profession — Failure to file memorandum of appeal in time — Not remedied by unsuccessful application to extend time — Retainer not affected by client's failure to pay due instalment of fees — Appeal against exercise of discretion — Guiding principles — Burden of proof as to damages — Immaterial whether negligence act that of barrister or solicitor — Advocates and Solicitors Ordinance, 1947, ss. 2, 59, 60 & 63.

Practice and Procedure — Non-compliance with Rules of court — Application for extension of time refused — R.S.C. 1957, O. 58 r. 22 as amended by the Supreme Court (Amendment) Rules, 1960, r. 5(3).

Practice and Procedure — Jurisdiction — Discretion — Review of discretion of court — Principle upon which the court will act.

This was an appeal by an advocate and solicitor, *M*, against whom judgment had been given in an action for negligence by his former client, *K*, in the High Court at Muar, Johore.

The action for negligence arose out of a civil action in the Sessions Court in which *K* had retained *M* as his advocate and solicitor. *K* failed in his defence to this action and had instructed *M* to appeal. The notice of appeal was filed within the prescribed time but the memorandum was not. *M* then made an unsuccessful application for extention of time relying upon his clerk's ignorance of a change in the relevant rule.

Ac action for negligence against *M* founded on the failure to file the memorandum in time succeeded, the trial judge finding that this failure clearly constituted a breach of duty to exercise proper care. Damages of $2,534 were awarded to *K*. In his appeal it was argued for *M*, *inter alia*, that as he was an officer of the court public policy required that he should be protected from suits brought by disgruntled litigants. In dismissing the appeal, the court made observations on the liability of an advocate and solicitor in a fused profession and:

Held: (1) an advocate and solicitor is under a contractual duty to use care and this extends to the conduct of a cause;

(2) the position of an advocate and solicitor is exactly the same as that of a solicitor in England and if there is an act of negligence it is immaterial to consider whether the act is one normally done in England by a barrister or a solicitor;

(3) in an action against a solicitor for negligence in litigation the burden is on the solicitor to show that the client was not damnified;

(4) on the facts of the action before the sess ons court *K* would in all probability have succeeded in his appeal had it been prosecuted and therefore the damages awarded against *M* were proper.

(5) having accepted instructions to and having filed the notice of appeal it was not open to *M* to argue that there was no solicitor and client relationship because *K* had failed to pay *M* a due instalment in his fees;

(6) the unsuccessful application for extension of time did not remedy the omission to file the memorandum in proper time;

(7) to succeed in an appeal against the exercise of discretionary jurisdiction, the appellant must show that the discretion was exercised on a wrong principle so that there has been a miscarriage of justice. This, the appellant failed to do;

(8) while a solicitor is not expected to know every statute, there are statutes some which it is his duty to know.

Observations on burden of proof as to damages.

Cases referred to:—

(1) *Hendry* v. *de Cruz* [1949] M.L.J. Supp. 24, C.A.

(2) *Fletcher & Son* v. *Jubb, Booth & Helliwell* [1920] 1 K.B. 274; 89 L.J.K.B. 236; 122 L.T. 258; 36 T.L.R. 19.

(3) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228, P.C.

(4) *Rondel* v. *Worsley* [1967] 1 Q.B. 443 at 504; [1966] 3 W.L.R. 950 at 964; [1966] 3 All E.R. 657 at 666*.

(5) *Godefroy* v. *Jay* (1831), 7 Bing. 413.

---

* On appeal to the House of Lords, see [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993. The appeal was also dismissed. *Ed.* M.L.J.

FEDERAL COURT.

D. A. Devadason for the appellant.

H. B. Ball for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Muar for $2,534 for negligence against the appellant, an advocate and solicitor of the High Court of Malaya.

The facts of the case would appear to be as follows. The respondent retained the appellant as his advocate and solicitor to defend him in a civil action in the sessions court at Muar. The respondent was sued as an endorser of a dishonoured cheque. A second defendant who was sued as the drawer of the cheque admitted the claim and judgment with costs was entered against him. The respondent contested the action but at the conclusion of the hearing judgment was also entered against him on 1st May 1962. Dissatisfied with this decision the respondent instructed the appellant to appeal. The notice of appeal was signed by both the respondent and the appellant on the 3rd day of May 1962 and filed within the prescribed time. Subsequently after the record of appeal had been prepared by the sessions court, a notice under rule 2(1) of Order 59 of the Rules of the Supreme Court, 1957, was served on 18th August 1962 on the appellant. In terms of the said rule 2(1) the memorandum of appeal should have been filed within 14 days from 18th August 1962. This, however, was not done. Application was made by the appellant on behalf of the respondent to the High Court for extension of time. This application came before the High Court on 24th November 1962. It was supported by an affidavit of Chia Teng Kee, appellant's clerk. That affidavit admitted the service of the notice served by the sessions court on the appellant and then went on to say that he, the affirmant, filed the above-said notice in the office file and did not bring it to the notice of the appellant in time as he was ignorant of the amendment of Order 59 of the Rules of the Supreme Court. This amendment came into force in 1958. What he intended to convey I think is this: under the old rule there was no time limit to the filing of the memorandum of appeal but after this amendment the memorandum of appeal has to be filed within 14 days from the date of the service of the notice on an appellant or his solicitors.

The judge's notes in the application for the extension of time showed that the appellant referred to Order 59 of the Supreme Court Rules as it was before the amendment and as it is now. In support of his application he also dealt on the merits of the appeal and in so doing produced for reference of the court the notes of evidence of the trial before the sessions court. There is no doubt that his main ground in support of his application was that the failure to file the memorandum of appeal in time was due to the ignorance of his clerk of the amendment to Order 59.

Counsel for the other party whilst indicating he was prepared to leave the matter entirely in the court's hands referred to the court the case of *Hendry* v. *de Cruz.*[1] In that case the court of appeal held that the mistake of the clerk of the legal adviser for the appellant did not constitute a ground for granting special leave to extend the time in which to appeal.

The court dismissed the appellant's application. The respondent thereupon brought this suit against the appellant for negligence.

In his statement of claim the respondent alleged that he suffered damage from appellant's negligence in his conduct of business undertaken by him on the respondent's retainer.

The negligence alleged was in failing to file in the High Court the memorandum of appeal referred to previously within 14 days from the date of service on the appellant of the notice under rule 3(2) of Order XXIX of the Subordinate Court Rules, 1950.

In his statement of defence the appellant denied negligence on the ground that the respondent had failed to give him instructions in time to file a memorandum of appeal, and further stated that he (the appellant) took further steps by applying for extension of time to file the memorandum of appeal before the High Court which dismissed the application for extension of time on the ground that there were no merits in the appeal.

The statement of defence also denied paragraphs 4(A), (B), (C), (D), (E) and 5 of the statement of claim.

The High Court gave judgment in favour of the respondent and awarded $2,534 as damages.

In his judgment the learned trial judge referred to Order 59 of the Rules of the Supreme Court and the date of its amendment and went on to say that the appellant must have been aware of the requirements under the amended Order that a memorandum of appeal had to be filed within the prescribed time and if his own clerk was ignorant of the change of the rule it was because he had not been properly instructed by his employer. The appellant's failure to give proper instruction to his clerk had resulted in the respondent's loss of his right of appeal and therefore found that the appellant was negligent. In support the learned trial judge cited a passage in the judgment of Scrutton L.J. in *Fletcher & Son* v. *Jubb Booth & Helliwell* [2] at p. 281. The passage reads as follows:—

> "Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which is his duty to know; and in these

days when the defendants in so many actions are public authorities the Public Authorities Protection Act, 1893, is one of those statutes. . . ."

Further at page 282 the learned Lord Justice went on to say:—

"The period of limitation was one of those matters which the respondents as the appellants' legal advisers ought to have borne in mind. It was negligence not to bear it in mind. For these reasons I agree that the appeal should be allowed."

The learned judge also went on to say that in the course of the evidence at the trial an attempt was made to give an additional reason for the delay in filing the memorandum of appeal. The intention there was clearly to put the blame on the respondent for being unable to sign the memorandum of appeal in time. The judge, however, dismissed this ground by saying that the relevant rule did not seem to require the respondent, to sign the memorandum of appeal in the circumstances, as a solicitor had been retained for the appeal. He also found that the failure to file the memorandum of appeal within the prescribed time was clearly breach of duty to exercise proper care.

There are several grounds of appeal but Mr. Devadason started his argument on behalf of the appellant by saying that the appeal raised 4 issues, namely:—

(a) Do the facts disclose that there was a duty of care between the appellant and the respondent?

(b) If so, do the facts disclose that there was a breach of that duty?

(c) If so, can the respondent's alleged loss be attributable to the appellant's breach of duty?

(d) If so, what is the measure of damages recoverable?

As I understood him, Mr. Devadason's contention under paragraph (a) was that there was no relationship of solicitor and client between the appellant and respondent at the time the memorandum of appeal was to be filed, because the respondent had failed to pay the next instalment of fees as previously agreed to between them and secondly, the respondent was not available for the purpose of signing the memorandum of appeal.

In reference to this point, surely, having indicated to the court, in signing notice of appeal and filing it, that he was a solicitor to the respendent, the appellant could not say that he was no longer so, without previously getting the leave of the court.

In any case I would prefer to deal with this appeal according to the written grounds of appeal filed by the appellant. I will deal with the first ground first and it reads as follows:—

(1) The learned judge erred in law and in fact in failing to consider the following points on the liability of the appellant for negligence:—

(a) The appellant remedied the omission, if any, by applying to the court for an extension of time. The special reason shown in the application for extension of time was that the appeal had substantial merits but the court thought otherwise. The reason for refusal is evident from the defence of the appellant which has not been considered by the learned judge.

(b) The refusal of the respondent in despositing money into court resulted in the application for extension of time being finally refused. The learned judge has not dealt with this piece of evidence in his judgment. If he had given his consideration to this defence evidence, the balance of probability would have been in favour of the appellant and the appellant in the circumstances could not have been negligent.

In reference to ground (a) since the application for extension of time was refused, I cannot understand how it could be argued that the appellant had remedied his omission to file the memorandum of appeal in time. There is no indication in the judge's notes to the effect that the extension of time was refused on the ground that there was no merit in the appeal. It would appear to be more probable that it was refused merely on the ground that the clerk had made a mistake. After all, that was the ground upon which the appellant himself relied and is disclosed in the affidavit of his clerk in support of the application.

In reference to paragraph (b) the appellant stated in his evidence that at the hearing for the extension of time, the learned judge asked if his client was prepared to pay into court a sum of money and this the respondent refused to do so.

In reference to this matter though evidence was given by the appellant in this connection, but denied by the respondent, at the trial of the suit, there was no reference to it in the judge's notes at the hearing of the application for the extension of time, though he referred to this in his judgment in the suit as follows:—

"The present plaintiff then applied to the High Court for extension of time. This came before me on 24th November 1962 and was refused. The notes of argument, a copy of which appears at page 15 of the agreed bundle A did not state the reason for the refusal and I do not think it fair to state one now."

In my view this ground must fail.

The second ground of appeal reads as follows:—

"The learned judge erred in law in refusing the appellant's application for amendment to the defence at the time of the trial. Had the amendment been allowed in the interest of justice the appellant would have found that the appellant was not negligent for the following reasons:

(a) The respondent himself is responsible for the delay in filing the memorandum of appeal as he failed to call at the appellant's office to sign the memorandum of appeal despite 4 reminders.

(b) By retaining the appellant to make application for extension of time the respondent had waived his rights, if any, against the appellant for negligence."

The appeal under this ground is an appeal against the discretion of the trial court. It is an appeal against the refusal of the learned judge made at the hearing for leave to amend paragraph 3 of the statement of defence by inserting a sentence in it.

If that amendment had been allowed, paragraph (3) would have read as follows:—

"The defendant denies that there was negligence on his part in not filing the memorandum of appeal referred to in paragraph 4 of the statement of claim as the plaintiff has signified his consent to an application for extension of time and as the plaintiff failed to give instructions in time to file the memorandum of appeal and said that the defendant took further steps by applying for extension of time to file the memorandum of appeal and arguing the grounds contained in the memorandum of appeal before his Lordship felt that there were no merits in the grounds contained in the memorandum of appeal."

I have underlined the sentence intended to be inserted by the counsel for the appellant.

Mr. Ball for the respondent in the appeal indicated that he would be prepared to argue that even if the trial court had allowed the amendment that paragraph would have no substance in law and indeed he so argued before us. I would prefer however, to dismiss this ground of appeal on the ground that this was an appeal against the discretion of the lower court and in so dismissing it, cite the following passage from the judgment of the Privy Council in *Ratnam* v. *Cumarasamy & Anor.*:—[3]

"The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co.* v. *Johnston* [1942] A.C. 130 Lord Wright at p. 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised in a contrary way or that there has been a miscarriage of justice (*Evans* v. *Bartlam* [1937] A.C. 473)."

It was not shown to us at the hearing of this appeal that the court had exercised its discretion on a wrongful principle so that there has been a miscarriage of justice. Accordingly I would therefore dismiss this ground of appeal.

Ground 3 of the grounds of appeal was withdrawn.

I will deal with ground 4 last.

Ground 5 is only a general ground.

Ground 6 reads as follows:—

"The facts in the case (*Fletcher & Son* v. *Jubb, Booth and Helliwell* [2]) on which the learned judge relied on the principle relating to the duty of solicitors are not the same as in the appellant's case."

In that case a solicitor was held to be negligent because he failed to consider the provisions of the Public Authorities Protection Act, 1893, section 1 in preparing a claim against a corporation for neglect or default in the execution of a public duty. Bankes L.J. in his judgment says this:—

"Now solicitors are under an obligation to bring to the discharge of their duty as solicitors reasonable care and skill and knowledge of the practice of the court whose process they invoke on behalf of a client. A solicitor, as was said by Tindal C.J. in *Godefroy* v. *Dalton* (1830) 6 Bing. 460, 468) 'is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct for a cause as is usually and ordinarily alloted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.' The respondents were certainly under an obligation to know the provisions of the Public Authorities Protection Act, 1893, s. 1, and to bear them in mind at every material stage of the proceedings."

Scrutton L.J. in the same case has this to say:—

"Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are statutes which it is his duty to know: and in these days when the defendants in so many actions are public authorities the Public Authorities Protection Act, 1893, is one of those statutes."

In my view the principle set out in the above passages is relevant to the question before the trial court in this case. I would dismiss this ground of appeal.

I now turn to ground 7 which in my view raises a very important question of law in this country.

Ground 7 is as follows:—

"The learned judge has erred in law in failing to direct his mind that the respondent had no cause of action against the appellant in that an advocate be he a barrister or solicitor who appears for a client in court of law is an officer of justice as the judge is and as in the case of the judge public policy requires that he should be protected from suits brought by disgruntled litigants. He further failed to direct his mind to the liability of a solicitor in a fused profession."

In reference to this ground of appeal *Rondel* v. *Worsley* [4] was referred to us. In that case a barrister was sued for damages on the ground that he was negligent in conducting a case. Lawton J. at the trial held the view that any advocate be he a barrister or solicitor who appears for a client before a court of law should be protected from suits brought by disgruntled litigants. But on appeal to the Court of Appeal the court held that only a barrister as such should be protected and not a solicitor irrespective as to whether the negligent act was in reference to the conduct of a trial or elsewhere.

This is what Lord Denning M.R. at page 504 D — E has to say:—

"The position of a solicitor is quite distinguishable from that of a barrister. He is not bound to act for anyone who asks him. He can pick and choose. He can sue for his fees. He can, and does, make a contract with every client who employs him. He is under a contractual duty to use care: and this extends to his conduct of a cause as well as an advocate as anything else. If he is negligent he can be sued. The action lies in contract, not in tort — see *Groom* v. *Crocker* [1939] 1

K.B. 194, 222; [1938] 2 All E.R. 394. So damage need not be proved."

In my view, since the profession of a barrister in this country is combined with that of a solicitor, the question must be dealt with differently. It is necessary in my view, to refer to the provisions of our own law dealing with this matter namely the Advocates and Solicitors Ordinance, 1947. In section 2 "advocate and solicitor" is defined as an advocate and solicitor admitted and enrolled under the Ordinance and a "practitioner" is defined as an advocate and solicitor in possession of a valid certificate to practise.

In section 59, for the purpose of sections referred hereinafter, "client" is defined as any person who retains or employs a practitioner and any person who is or may be liable to pay the bill of costs of the practitioner. Under section 60 it is provided that a practitioner may make an agreement in writing with his client respecting the amount and manner of payment of his costs in respect of business done or to be done by such practitioner. In other words, he may make an agreement in reference to the payment of his costs.

He is therefore under a contractual duty to use care and this extends to the conduct of a cause as well as an advocate as anything else. Therefore if he is negligent he can be sued. Indeed section 63 provides that any provision in any such agreement that the practitioner shall not be liable for negligence so that he shall be relieved of any such responsibility to which he shall be subject as such practitioner, shall be wholly void.

In other words the position of a practitioner is exactly that of a solicitor in England.

In the circumstances it is immaterial whether the act of negligence committed by a practitioner is an act normally done by a solicitor or a barrister in England.

I will now deal with ground 4 which reads as follows:—

"4. The learned judge's reasoning for holding the appellant liable to the extent of 100% is wrong in law and in fact. There was no certainty that the respondent would have succeeded in the appeal."

The amount of $2,534 was made by (a) $1,784 being the judgment in the sessions court which the respondent had paid, (b) $100 being costs paid by the respondent to the appellant in respect of the appeal to the High Court for extention of time, (c) $100 being half of the amount paid by the respondent to the appellant in respect of civil action in the sessions court and (d) $150 being costs paid by respondent to the appellant in respect of civil action in the sessions court and $400 being costs paid to solicitors for the plaintiff in the sessions court.

In reference to this matter *Godefroy* v. *Jay* [5] was cited to us and at page 162 Tindal C.J. said as follows:—

"Then comes the question, whether these damages are excessive: that depends on the question, whether it was the duty of Jay, the defendant in this action, to adduce evidence to shew that Godefroy the plaintiff was not damnified by the judgment by default in the former action, or whether it was for Godefroy to establish that Dubois would not have recovered against him. According to all the cases, it was not to be expected that Godefroy should be called on to furnish such proof."

In other words the burden is on the appellant to show that damages were excessive and this the appellant never did but as I understand the ground the objection against this award is not so much for its excessiveness but rather on the ground that there was no certainty that the respondent would have succeeded in the appeal. It is therefore necessary to consider the facts of the sessions court case and the relevant law thereto.

In the sessions court case it was alleged that the respondent had entered into an agreement with another (second defendant in the suit) that the respondent was to pay any money due to the latter for work done for the respondent in the presence of the plaintiff who was to supply goods and provisions to the second defendant. Accordingly goods were being supplied by the plaintiff to the defendants but on 17th March 1961 there was a balance of $1,784.60 due by the second defendant. The plaintiff alleged that these payments were guaranteed by the respondent. Subsequently it was alleged that the respondent handed a cheque for the same amount to the second defendant for the payment of the sum due, but when the cheque was presented to the bank it was returned endorsed with the words "payment stopped." The respondent denied that he guaranteed the payment of the goods supplied by the plaintiff to the second defendant.

The president, sessions court, gave judgment in favour of the plaintiff and among other things held that the respondent (who was also known as Hew Foh stood as a guarantor for the goods supplied by the plaintiff to the second defendant by reason of exhibit P.2. Exhibit P.2 reads as follows:—

"Now Wong Kim requests Hew Foh to fell 'A' plot jungle not counting the acreage, but counting only one thousand four hundred and sixty-five 'kong' (day's work). Wong Kim's commission is not included. Rate as for each 'kong' (day's work) is eight dollars and total amount is dollars eleven thousand seven hundred and twenty only. After deducting amount of cash advance and goods supplied by Hew Foh to Wong Kim whatever balance remaining shall be paid in full to Wong Kim after the official map of plot 'g' has been returned. Money owing to or by the workmen shall be dealt with by Wong Kim, and shall not concern Hew Foh. But payment must be made in the presence of the proprietor of Chop Foh Kee,

and not otherwise. Fearing that words of mouth are proofless, this document is drawn as proof.

Signature to this document: Sd. Hew Foh (In Chinese)
Sd. Wong Kim

Witnesses: Sd. Woon Sak Seong
Sd. Foh Tat.

Dated the 16th day of the 3rd Month 1961 at 10.30 p.m."

Now Wong Kim is the second defendant and Hew Foh is the first defendant i.e. respondent. It is evident that this document upon which the plaintiff in that suit relied to substantiate his claim against the respondent, nowhere states that respondent guaranteed the payment of any money due by the second defendant for the supply of goods to him by the plaintiff. On the contrary it specially provides that any money owing by the workmen shall be dealt with by Wong Kim and shall not concern Hew Foh. All that was required of the respondent was that he shall not pay any money due to the workmen except in the presence of the plaintiff.

For these reasons I am of the view that the appeal against the judgment of the learned president would, if considered by the High Court in all probability have succeeded. I am of the view that ground 4 must also fail.

I would therefore dismiss the appeal with costs.

Ismail Khan and **Gill JJ.** concurred.

Appeal dismissed.

Solicitors: *D. A. Devadason; Allen, Gledhill & Ball.*

KOH TECK CHAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) December 12, 1967]
[Penang — Criminal Appeal No. 49 of 1967]

Criminal Procedure — Withdrawal of charge — Discharge of accused — Whether discharge should amount to acquittal — Criminal Procedure Code (S.S. Cap. 21), s. 187(1); Criminal Procedure Code, (Cap. 6), s. 254(ii).

This was an appeal from the order of the learned magistrate at Penang made on June 13, 1967 when the appellant was discharged such discharge not amounting to an acquittal on an application by the prosecuting officer. Counsel for the appellant strongly objected thereto and submitted that no grounds had been given in support of the application and therefore the order should be a discharge amounting to an acquittal. A short adjournment was granted and the prosecuting officer on resumption gave as the reasons for his request first, that a civilian witness was still untraced and *subpoena* had not been served and secondly, it was intended probably to proceed against the appellant by way of departmental action. The learned magistrate gave as his ground for not granting appellant's counsel's request that "I held I had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal without a trial".

This case related to an offence alleged to have been committed on July 28, 1966 and the summons was applied for almost five months later on December 22, 1966. The case was finally called on June 13, 1967 when the order appealed from was made.

Held: the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned magistrate should be varied so that the discharge should amount to an acquittal.

Cases referred to:—

(1) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(2) *Seet Ah Ann* v. *Public Prosecutor* [1950] M.L.J. 293.

(3) *Goh Oon Keow* v. *R.* [1949] M.L.J. 35.

(4) *Tan Ah Chan* v. *R.* [1955] M.L.J. 218.

(5) *Ariffin bin Cassim Jayne* v. *Public Prosecutor* [1953] M.L.J. 126.

MAGISTRATE'S CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J.: This is an appeal from the order of the learned magistrate at Penang made on the 13th day of June, 1967 when the appellant was discharged not amounting to an acquittal on an application by the prosecuting officer. Counsel for appellant strongly objected thereto and submitted that no grounds had been given in support of the application and therefore the order should be a discharge amounting to an acquittal. A short adjournment was granted and the prosecuting officer on resumption gave as the reasons for his request first that a civilian witness was still untraced and *subpoena* had not been served and secondly it was intended probably to proceed against the appellant by way of departmental action. The learned magistrate gave as his ground for not granting appellant's counsel's requested that "I held I had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal without a trial".

The learned magistrate in my view had in so holding misconstrued the case of *Kuppusamy* v. *Public Prosecutor* (1) which ruled that an order of acquittal in summary trials can only be made under paragraphs (f), (g) and (m) of section 173 of the Criminal Procedure Code (F.M.S. Cap. 6).* It in no way was meant to rule out the application of section 254(ii) of the F.M.S. Code

*Note: Section 173 of the F.M.S. Code corresponds to section 182 of the S.S. Criminal Procedure Code (Cap. 21). In the F.M.S. Criminal Procedure Code paragraph (g) uses the word "discharging" instead of "acquitting" and therefore *Kuppusamy's* case should be read with this in mind.